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TITLE VII: LEGAL PROTECTION AGAINST SEXUAL HARASSMENT

Title VII of the 1964 Civil Rights Act¹ has been recognized since its enactment as potentially one of the most important existing legal tools with which to attack employment practices which discriminate on the basis of race, sex, religion, or national origin. It has been stated that Congress intended the Act to remove "artificial, arbitrary, and unnecessary barriers to employment when [they] operate invidiously to discriminate on the basis of racial or other impermissible classification,"² and that it intended "discriminate" to be defined as broadly as possible.³ For the most part, the courts have taken up the challenge and given the statute a liberal and sympathetic interpretation.⁴ In a recent series of decisions, however, several federal district courts have departed from the well-established expansive reading of the statute to remove an entire category of discriminatory activity from the Act's

1. 42 U.S.C. §§ 2000e to 2000e-15 (1970). Section 2000e-2 provides:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

The inclusion of the word "sex" among the protected categories in Title VII of the 1964 Civil Rights Act was a major victory for United States women, yet, ironically, the battle for the amendment adding "sex" to the Act was fought by Southern male legislators in the House of Representatives, presumably in the hope of defeating the entire Civil Rights Act. The amendment was introduced after several weeks of debate on the Act, the day before the final vote was taken, and passed without hearings and with little serious discussion. See, e.g., 110 CONG. REC. 2581, 2582 (1964) (remarks of Rep. Green); K. DECROW, *SEXIST JUSTICE* 118 (1975); Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 311 (1968); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 883 n.34 (1967); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 677 n.35 (1968); Comment, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484, 491 (1968).

2. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

3. E.g., *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("This language evinces a Congressional intention to define discrimination in the broadest possible terms").

4. Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831, 865 (1976).

purview—sexual harassment of an employee by an employer or supervisor.⁵

Since 1974, there have been five district court cases involving sexual harassment of employees. Three courts have held that Title VII absolutely does not apply;⁶ one court has acknowledged that there could be situations involving sexual harassment of employees in which Title VII might apply;⁷ and one court has fully embraced the application of Title VII in sexual harassment cases.⁸

In the first of the five cases, *Barnes v. Train*,⁹ the plaintiff claimed that she was terminated because she refused her supervisor's request for an "after-hours affair." The court held that she was discriminated against not because of her sex but because she refused to engage in a sexual relationship. This, the court asserted, evidenced not an arbitrary barrier to employment but rather an inharmonious personal relationship. This decision marked the introduction of two recurring themes: whether the discriminatory conduct is gender-based, and whether the supervisor can be treated as the representative of the employer. In *Corne v. Bausch & Lomb, Inc.*,¹⁰ the fact situation was

5. Sexual harassment is almost exclusively a problem faced by women, and it may take any of several forms. The verbal or physical advances to which a woman finds herself subjected while on the job may be so offensive as to lead to a constructive termination when she can no longer tolerate them. She may find herself transferred, fired, demoted, or refused promotion for refusing to go out with, or to engage in a sexual relationship with, her employer or supervisor; or, for the same reasons, she may be denied the job in the first place. The problem is a serious one. Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, November 1976, at 149 (92% of 9,000 women interviewed believed sexual harassment to be a problem, and the majority of them found it a serious problem); 51 N.Y.U.L. REV. 148, 149 n.6 (1976) (citing a study showing that 49% of all women employed at the United Nations find sexual pressure on the job and another study conducted at Cornell University in which 92% of the 155 respondents found sexual harassment to be a serious problem and 70% had actually suffered from it); Lindsey, *Sexual Harassment on the Job*, Ms., November, 1977, at 47.

A complaint filed in the Alaska federal district court alleged that the female plaintiff was rejected for the position of equal employment officer because, ironically, she refused to engage in sex acts with the employer's senior management official. *Rinkel v. Associated Pipeline Contractors, Inc.*, No. 74-329 (D. Alas., filed June 29, 1977). Another suit was recently brought in a closely related area. Four female students and a male professor filed a class action suit in the federal district court at New Haven, Conn., charging Yale University with sex discrimination for sexual harassment of female students by their male professors. *TIME*, Aug. 8, 1977, at 52.

6. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974).

7. *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976).

8. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

9. 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974).

10. 390 F. Supp. 161 (D. Ariz. 1975).

somewhat different. The two female plaintiffs claimed that because of the offensive verbal and physical sexual advances of their male supervisor they had to resign, and therefore were constructively terminated. The two concerns of the *Barnes* court were reiterated and a third theme added—that recognizing sexual harassment as a proscribed activity would open the doors of the courtroom to a flood of baseless litigation. In response to these concerns, the court found that plaintiffs failed to state a cause of action under Title VII. While rejecting the *Corne* court's contention that a supervisor's acts are not to be imputed to the employer, the opinion in *Tomkins v. Public Service Electric & Gas Co.*,¹¹ the most recent of the cases, once again held that sexual harassment is not harassment on the basis of sex and found that plaintiff's termination for refusing the sexual advances of her supervisor was not actionable under Title VII. There, too, the court was very concerned that the floodgates would be opened and that the courts would be, in effect, tampering with nature if they were to attempt to regulate in this area.

Tomkins was decided after two courts had found Title VII to be applicable to sexual harassment cases: the first, in *Williams v. Saxbe*,¹² unabashedly proclaimed sexual harassment to be sex discrimination; the other, in *Miller v. Bank of America*,¹³ more cautiously admitted that there might be situations in which sex discrimination could be found. In *Williams*, the court found that plaintiff's termination for refusing to date her supervisor was sex-based discrimination, thus disposing of the first of the earlier courts' concerns. It found further that whether the supervisor was imposing an employment policy or practice was a question for factual determination, and that if it was found to be the policy of the supervisor, then it was also the policy of the employer. Requiring such a factual finding, it asserted, would ensure that the courts would not become bogged down with baseless claims. Although somewhat reluctantly agreeing with the *Williams* court that sexual harassment could state a cause of action, the *Miller* court joined the *Barnes* court in voicing the concern that such a holding might expose the courts to a barrage of sexual harassment cases. As a result, the *Miller* court established rather stringent proof requirements, and rejected the particular plaintiff's claim that she was

11. 422 F. Supp. 553 (D.N.J. 1976).

12. 413 F. Supp. 654 (D.D.C. 1976).

13. 418 F. Supp. 233 (N.D. Cal. 1976).

terminated for being sexually uncooperative. This determination in *Miller* was used to support the *Tomkins* court's contention that sexual harassment stated no Title VII cause of action,¹⁴ when, in fact, *Miller's* holding went only to the degree of proof necessary.

This comment will focus on the three major themes raised by these decisions: (1) whether sexual harassment is or can be gender-based; (2) whether or not the supervisor must be treated as the representative of the employer; and (3) whether recognition of a Title VII cause of action will inundate the courts with unfounded claims of harassment. After exploring the approaches and analyses of the various courts, the comment concludes that sexual harassment can constitute a violation of Title VII's prohibition against sex discrimination; and that whether it does or not is basically a question of fact.

I. SEXUAL HARASSMENT AS GENDER-BASED DISCRIMINATION

The most difficult task facing the plaintiff in sexual harassment cases is showing that she was subjected to the objectionable treatment because of her sex. All of the courts holding Title VII inapplicable to cases of sexual harassment have done so by concluding, through various means, that however discriminatory the practice might be, it was not based on sex. They have accomplished this by finding either that since sex was not the only factor involved¹⁵ (so-called "sex-plus" discrimination), or that since the practice could as easily have been directed at males,¹⁶ it was not gender-based discrimination. When there has been only one incident of sexual harassment, the act is not on its face gender-based, and the second of these arguments becomes a forceful one.¹⁷ Although the courts have employed this reasoning to reject the underlying Title VII cause of action, it will be shown that

14. The *Miller* court very explicitly found that a cause of action could be stated: "Obviously, as in *Williams v. Saxbe*, . . . there may be situations in which a sex discrimination action can be maintained for an employer's active, or tacit approval, of a personnel policy requiring sex favors as a condition of employment." 418 F. Supp. at 236.

15. See text accompanying notes 36-47 *infra*.

16. See text accompanying notes 20-35 *infra*.

17. Observing the harassing act in a sociological vacuum, gender could well appear irrelevant. The same problem would arise if a single black person were discharged—with neither an express verbalization nor statistical evidence of racial basis for the firing, it would be difficult to show discrimination.

this consideration should reach only the question of proof, and not whether a cause of action has been stated.¹⁸

Because the Act does not proscribe all types of discrimination,¹⁹ the threshold question must be whether the gender variable is present—if the disparate treatment is totally arbitrary or falls on a group not explicitly covered, the statute will offer no protection. Consequently, if sex is not a variable there can be no sex discrimination within the meaning of Title VII.

A. Characteristics Peculiar to One Gender

The courts in both *Corne*²⁰ and *Tomkins*²¹ held that it would be ludicrous to hold sexual harassment of women actionable under Title VII because there would be no basis for suit if the harassment were directed equally toward males. Certainly it is true that once a policy, however offensive, is applied equally to all parties concerned, there is no discrimination.²² Nevertheless, without evidence that male employees are subjected to the same type of harassment, the argument becomes pointless. It is no answer to a charge of discrimination to show that under other circumstances the conduct complained of would be non-discriminatory.²³

To hold otherwise is to concur with those who insist that Title VII prohibits only those practices that discriminate on the basis of characteristics that are peculiar to one gender.²⁴ This reading would severely

18. See text accompanying notes 48–62 *infra*.

19. E.g., *King v. Seaboard Coast Line Ry.*, 538 F.2d 581 (4th Cir. 1976) (discrimination in favor of “drunks” does not state a cause of action under Title VII—Title VII only protects against discrimination based on race, color, religion, sex, or national origin); *Bradington v. International Business Machs. Corp.*, 360 F. Supp. 845 (D. Md. 1973) (no federal statute prohibits discrimination *per se*—in order to state a cause of action under Title VII the discriminatory conduct must be based on race, color, sex, religion, or national origin).

20. 390 F. Supp. at 163.

21. 422 F. Supp. at 556.

22. EEOC Dec. (CCH) ¶ 6100 (1970).

23. If, for example, an employer required its black employees to perform undesirable work that its white employees were not required to perform, that would be discriminatory. However, if all employees were required to do the same unpleasant work, they might complain but they could not charge discrimination. That this second, neutral, situation is conceivable does not make the first any less discriminatory. The fact that sexual harassment might be applied to men as well as women under another set of circumstances does not negate the conclusion that it is discriminatory when it is applied only to women. *United States v. Lee Way Motor Freight, Inc.*, 7 Empl. Prac. Dec. 6461 (W.D. Okla. 1973).

24. *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976) (argument of de-

limit the application of the Act. The list of immutable sex-linked characteristics that might affect employment decisions is not very long—pregnancy,²⁵ beards,²⁶ breasts,²⁷ and, in some very limited instances, sex organs²⁸ would fall into this category—and to restrict Title VII to these categories would render it virtually meaningless. Furthermore, this construction appears to contradict actual holdings in the area.²⁹ The courts that have dealt with these immutable characteristics have reasoned that there is no discrimination, since similarly situated persons of the other sex are not treated differently.³⁰ The Supreme Court, in *Geduldig v. Aiello*,³¹ found that it was not violative of the equal protection clause of the fourteenth amendment to exclude pregnancy from disability insurance coverage and, in *General Electric Co. v. Gilbert*,³² extended the holding to cases arising under Title VII. The Court stated in *General Electric* that there was no risk from which men were protected and women were not—that is, persons of one sex were not treated differently from similarly situated persons of the other. Hence, discrimination on the basis of the immutable characteristic of pregnancy was found to be not actionable. Lower courts have come to the same conclusion concerning beards³³ and breasts.³⁴ It

fendant that discrimination must be based upon characteristic peculiar to one gender rejected by court).

25. *E.g.*, *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976) (exclusion of pregnancy-related disabilities from the employer's disability benefits plan does not violate Title VII); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (California's disability insurance coverage found constitutional under the equal protection clause of the 14th amendment in spite of its exclusion of pregnancy-related disabilities).

26. *Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972) (since only men can grow beards the discharge of a bearded man for facial hair was found not to violate the Civil Rights Act of 1964).

27. State Div. of Human Rights *ex rel.* Chamberlain v. Indian Valley Realty Corp., Case No. CS-21209-70, N.Y. State Human Rights Appeal Bd. (1970), *cited in* A. LARSON, *infra* note 30, at 3-22 n.58 (not sex discrimination to fire a waitress for being too flat-chested).

28. The sex organs of a sperm donor or a prostitute would constitute such immutable characteristics.

29. See notes 25-27 *supra*.

30. To arrive at such a conclusion, however, the courts have had to disregard the fact that the very use of the sex-exclusive standard in the first place constitutes sex differentiation. A better conclusion would be to find sex discrimination wherever women are treated differently from men, and then turn to the facts to determine if there is a bona fide occupational qualification (BFOQ), see note 39 *infra*, that might justify such treatment. 1 A. LARSON, *EMPLOYMENT DISCRIMINATION: SEX* § 12.12 (1975).

31. 417 U.S. 484 (1974).

32. 97 S. Ct. 401 (1976).

33. *Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972).

34. State Div. of Human Rights *ex rel.* Chamberlain v. Indian Valley Realty Corp., Case No. CS-21209-70, N.Y. State Human Rights Appeal Bd. (1970), *cited in* A. LARSON, *supra* note 30, at 3-22 n.58.

seems reasonable to conclude that sex discrimination will be found not when there is differential treatment based on immutable characteristics, but only in those instances when the practice could affect both sexes but is, in fact, being imposed on only one.³⁵ Sexual harassment certainly satisfies this test.

B. "Sex-Plus" Analysis

Another defense to the charge of sex discrimination has been that the plaintiff was discriminated against because she refused to engage in a sexual affair with her supervisor, and not because she was a woman.³⁶ This defense in its most basic form would find sex discrimination only if gender were the sole determining variable. The argument seemingly has been revived expressly to deal with the factual patterns of sexual harassment cases, in which there is an additional variable: the "willingness *vel non* to furnish sexual consideration."³⁷ It is true that at one time such an additional factor could have served to defeat the cause of action,³⁸ but it has long been established that so-called "sex-plus" discrimination is as invidious as sex discrimination alone.³⁹

35. This conclusion is borne out in the case law. Decisions such as *Lansdale v. United Air Lines, Inc.*, 437 F.2d 454 (5th Cir. 1971) (applying no-marriage rule only to female airline stewardesses violates Title VII), *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (a policy requiring female but not male flight attendants to be unmarried is violative of Title VII), and *Harrington v. Vandalia-Butler Bd. of Educ.*, 13 Fair Empl. Prac. Cas. 702 (S.D. Ohio 1976) (inferior working conditions of female physical education teacher found actionable under Title VII), found practices to be discriminatory that could easily have been applied to male employees but were in fact imposed only on women.

36. *Barnes v. Train*, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (court rejecting this defense).

37. *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976).

38. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir.), *rehearing denied*, 416 F.2d 1257 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1970). The court of appeals stated: "The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired." 411 F.2d at 4.

39. The Supreme Court, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), fortunately invalidated the "sex-plus" analysis of the court of appeals. Chief Judge Brown's dissent to the denial of rehearing at the circuit court level pointed out the potential danger of the "sex-plus" analysis:

If "sex plus" stands, the Act is dead. This follows from the Court's repeated declaration that the employer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder

In 1965, the Equal Employment Opportunity Commission (EEOC)⁴⁰ promulgated a rule rejecting the defense that women per se were not discriminated against when married women were treated differently from married men: "so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex."⁴¹ Thus, under this rule, the additional variable of marriage cannot serve to obscure the gender-based nature of the discrimination. The principle was firmly established in *Phillips v. Martin Marietta*

width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like.

416 F.2d at 1260 (footnotes omitted) (Brown, C.J., dissenting).

40. The Equal Employment Opportunity Commission (EEOC) was created under 42 U.S.C. § 2000e-4 (1970) and given powers of enforcement under 42 U.S.C. § 2000e-5 (1970). It has the power to receive complaints, issue charges, attempt conciliation, request preliminary relief from the district court if necessary, bring suit in the federal court, and intercede in any Title VII litigation.

Although Congress empowered the EEOC to investigate, conciliate, and recommend, rather than to adjudicate, its decisions have been given much weight by the judiciary. The Supreme Court stated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971), that the EEOC's administrative interpretations of Title VII are entitled to great deference. Professor Cornelius Peck submits that "without powers of either adjudication or substantive rulemaking, [the EEOC] has made pronouncements about the statute that are accepted by the courts as authoritative statements of the law." Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831, 832 (1976). The Court's explanation for rejecting the EEOC guideline on pregnancy in *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976), however, could be read to weaken this traditional deference. *Id.* at 410-13. The Court stated that it agreed with the role it gave to "interpretive rulings such as the EEOC guidelines" in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Court stated:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Id.* at 140. It must be assumed, however, that the courts have always weighed such factors before accepting an EEOC decision, for surely no amount of deference would render acceptable that which was poorly reasoned and fleetingly considered. That the Court here rejected the EEOC guideline must not be taken to mean that the traditional deference was not given, but merely that the guideline failed to meet the Court's criteria. As before, the strength of an EEOC decision lies in the force of its logic, not the force of its authority.

41. The full rule, entitled "Discrimination against married women," reads as follows:

The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

29 C.F.R. § 1604.4(a) (1976).

Corp.,⁴² in which the Supreme Court dealt with a company policy excluding from employment women, but not men, with pre-school age children. The Court found that Title VII did not allow one hiring policy for women and another for men, even though a second variable—pre-school age children—was an integral part of the discriminatory policy.⁴³ This principle has since been recognized by courts which have prohibited such disparate treatment as requiring female flight attendants to remain unmarried while allowing male flight attendants to marry,⁴⁴ and excluding from employment unwed mothers but not unwed fathers.⁴⁵

42. 400 U.S. 542 (1970).

43. *Id.* at 544. The Supreme Court remanded to the lower court for an opinion on whether the differential treatment of women and men with pre-school age children might be justifiable under the bona fide occupational qualification exemption, 42 U.S.C. § 2000e-2(e) (1970). 400 U.S. at 544.

Section 2000e-2(e) states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

This bona fide occupational qualification exception is being narrowly defined by the Commission and courts alike. K. DeCrow, *SEXIST JUSTICE* 108 (1975). "The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a) (1976). *Accord*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (adopting Commission guidelines that the BFOQ exception as to sex should be interpreted narrowly); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (concluding that Commission is correct in determining that BFOQ establishes a narrow exception); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (to deprive women of certain jobs under the BFOQ exception the burden is on employer to show that "all or substantially all" women would not be able to perform the duties of the position involved); *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969) (accepting *Weeks'* narrow interpretation of BFOQ exception).

44. *E.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (a policy requiring female but not male flight attendants to be unmarried violates Title VII of the Civil Rights Act of 1964); *Lansdale v. United Air Lines, Inc.*, 437 F.2d 454 (5th Cir. 1971) (applying no-marriage rule only to female airline stewardesses

In *Williams v. Saxbe*,⁴⁶ the court found that the additional factor of sexual consideration did not differ from the "no marriage" and the "no pre-school age children" rules described above. The court concluded:

It was and is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other. Therefore, this Court finds that plaintiff has stated a violation of Title VII's prohibition against "any discrimination based on . . . sex."⁴⁷

In light of the history of sex-plus discrimination, this conclusion is inescapable provided it can be found that the "artificial barrier" of requiring sexual consideration was indeed applied to one gender and not the other. Regardless of the outcome of this factual determination, the underlying cause of action has certainly been established.

C. *A Discernible Pattern of Discrimination*

Conceptually, then, sexual harassment can be considered sex discrimination. Having reached this conclusion, however, it remains very difficult to determine from the particular facts of any given case if gender is an operative variable. It is highly probable that any court would recognize as sex discrimination an articulated policy making employment of women contingent upon the giving of sexual favors. It is conceptually more difficult, however, when the policy is unstated and only one woman is subject to the requirement.

Finding the presence of the gender variable is a major obstacle when there is only one woman who has been sexually harassed.⁴⁸ If it cannot be shown statistically that only women are affected by a sexual-favor requirement, it must be determined in some other manner that the requirement was imposed on the employee because of her sex

violates Title VII); *Inda v. United Air Lines, Inc.*, 405 F. Supp. 426 (N.D. Cal. 1975) (a regulation requiring female flight attendants, but not male flight attendants, to resign upon marriage is unlawful).

45. *Andrews v. Drew Mun. School Dist.*, 507 F.2d 611 (5th Cir. 1975), *aff'g* 371 F. Supp. 27 (N.D. Miss. 1973). When a policy of not employing unwed parents affected only unwed mothers, the equal protection clause of the 14th amendment was found to be violated. This type of discrimination was found by the EEOC to be actionable under Title VII as well. 2 Fair Empl. Prac. Cas. 1016 (1970).

46. 413 F. Supp. 654 (D.D.C. 1976).

47. *Id.* at 659 (footnote omitted).

48. See note 17 *supra*.

rather than for another, nonactionable, reason. In other areas of Title VII's purview, neither the courts⁴⁹ nor the EEOC⁵⁰ have hesitated to find discrimination when there was only one victim. It seems, however, that sexual harassment is perceived as a unique situation: the *Miller* court decided that only in the case of consistent sex-based discrimination should the courts become involved; the *Williams* court may have reached the same conclusion when it found that to state a claim it was essential that the conduct complained of be a policy imposed on the plaintiff and *other women*.⁵¹

Although the fact that more than one woman has been subjected to a discriminatory practice tends to establish that it was applied on the basis of sex, an allegation of multiple incidents is not essential to a complaint of sexual harassment.⁵² There are several ways to determine the presence of the gender variable when there has been only a single instance of harassment. One's initial reaction is likely to be that if a male supervisor has sexually harassed a female employee, her gender was a critical variable. This reaction could be based either on the presumption that the supervisor is heterosexual, or the belief that sexual harassment reflects a general stereotyped view of women, or both. Were the courts to adopt either of these approaches, the plaintiff could establish a *prima facie* case of sex discrimination simply by

49. *E.g.*, *Harrington v. Vandalia-Butler Bd. of Educ.*, 13 Fair Empl. Prac. Cas. 702 (S.D. Ohio 1976) (imposition of inferior working conditions upon female physical education teacher found actionable under Title VII); *Anderson v. Methodist Evangelical Hosp., Inc.*, 3 Empl. Prac. Dec. 6944 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972) (corporation held liable for supervisor's race-based firing of individual employee).

50. *E.g.*, EEOC Dec. (CCH) ¶ 6283 (1971) (policy forbidding long dresses found to discriminate against plaintiff whose religion required that she wear a long dress, even though she was the only person so affected); EEOC Dec. (CCH) ¶ 6087 (1969) (firing a single black employee for "self-confident" manner found to violate Title VII); EEOC Dec. (CCH) ¶ 6085 (1969) (tolerating the telling of Polish jokes and making of derogatory remarks about employee's ancestry by fellow employees found actionable under Title VII, even though other employees of Polish descent were not offended). See note 40 *supra*, for weight accorded EEOC decisions.

51. The *Williams* court found that it was an "essential allegation" that the "supervisor's conduct was a policy or practice imposed on the plaintiff and other women similarly situated." 413 F. Supp. at 660 n.8. This statement is rather ambiguous, and a cursory reading might suggest a requirement that more than one woman have suffered the supervisor's conduct. Read in context, however, where it is asserted to counterbalance the contention that such conduct was a "nonemployment related personal encounter," *id.* at 660, one might reasonably conclude that the court meant only that the conduct must be a "policy" as opposed to an "isolated personal incident," and that the phrase "plaintiff and other women" was included merely as identification of the aggrieved parties.

52. See cases cited in notes 49 & 50 *supra*.

showing that the harassment occurred. Should the court not make these presumptions there is yet a third, more difficult, means of finding the gender variable—a factual determination of the supervisor's sexual orientation.⁵³

To make such a factual determination, the court or the Commission would, in effect, have to invade the defendant's privacy to determine liability on the basis of an affirmatively proven sexual preference. For policy reasons, it would seem better to avoid this type of investigation. Invading sexual privacy is questionable even for the most compelling reasons,⁵⁴ here it would serve only to make a nice distinction between prohibited discriminatory sexual harassment and permitted random sexual harassment. An initial presumption of heterosexuality would salvage the supervisor's right of privacy to some extent, because the decision to introduce contrary evidence of his sexual orientation would be his. Such a presumption, however, should not be lightly made. Establishing heterosexuality as a legally acceptable norm encourages the tendency to consider deviations from this norm as not only different, but indefensibly abnormal. Yet, should the court not accept the following analysis, such a presumption may be necessary.

The most palatable route would be judicial recognition of the stereotypic implications of sexual harassment.⁵⁵ Clearly, women are frequently perceived and treated as "sex objects" by men. The ubiquitous "men's" magazines—*Playboy*, *Penthouse*, *Oui*, and the like—with their demeaning photographs and humor, portray women as essentially sexual entities.⁵⁶ Every big city has its "combat zone" where adult book stores, peep shows, X-rated movies, strip shows, and massage parlors abound. The incidence of rape continues to climb,⁵⁷ and

53. It is interesting that at least the *Tomkins* court so readily accepts the possibility of bisexual supervisors—"The gender lines might *as easily* have been . . . not crossed at all." 422 F. Supp. at 556 (emphasis added). The courts have not always been so liberal. See, e.g., *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

54. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (denying married adults access to birth control information and devices found to invade individual's right to privacy and violate the 14th amendment).

55. For discussion of sex stereotyping in a sexual harassment context, see Brief for Plaintiff at 13-17, *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), and 51 N.Y.U.L. REV. 148, 153-59 (1976).

56. The monthly circulation figures for some of the largest of these magazines are: *Playboy*—5,405,443, *Penthouse*—4,365,679, *Oui*—1,258,249. '77 AYER DIRECTORY OF PUBLICATIONS 301, 642 (1977).

57. In 1974 there was one forcible rape in the United States every ten minutes.

prostitution flourishes.⁵⁸ The courts might well take judicial notice of the stereotype of woman as sex object.

Once the existence of such a gender-linked stereotype has been established, it can be utilized to infer the gender-linked character of the sexual harassment in question. If a woman has been transferred, fired, or not hired due to her refusal to tolerate sexual harassment, and her supervisor cannot provide a reasonable explanation for her treatment, then it can be presumed that it was based on the stereotype. In other situations, courts have been willing to draw comparable inferences from the sociological milieu in which the act occurred,⁵⁹ and the EEOC has expressly found that "repellent historical images" have a disparate effect.⁶⁰ When a woman has been treated as a "sex object" rather than a competent employee, it is not unreasonable to suppose that such treatment was based on a prevailing stereotype. That supposition leads directly to the conclusion that the harassment is actionable under Title VII, for the courts have uniformly condemned as discriminatory all stereotypic treatment based on sex.⁶¹ Perpetuating a sex-object stereotype in the realm of employment is flatly contrary to the intention of Congress in passing the Act.

FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 9 (1975). Forcible rapes increased by 8% from 1973 to 1974, *id.* at 22, and 5% in the first three months of 1977, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (January-March 1977). "Forcible rapes increased 146 percent from 1960 to 1971 and during 1972 rose sharply while the incidence of other serious crimes declined." B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES & REMEDIES 823 (1975) (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING (January-June 1972) and FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 61 (1972)).

58. In 1975 there were 68,200 arrests for prostitution and commercialized vice in the United States. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 179 (1976).

59. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954). "In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492-93.

60. 4 Fair Empl. Prac. Cas. 441 (1971) (EEOC found that referring to female employees, particularly black female employees, as "girls" evoked "repellent historical images" and was therefore a form of sex discrimination).

61. *E.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); *Manhart v. City of Los Angeles, Dep't of Water & Power*, 387 F. Supp. 980, 984 (C.D. Cal. 1975) ("In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead"); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089, 1096 (S.D. Ohio 1971), *rev'd on other*

With this approach, as with the initial presumption of heterosexuality, the supervisor is placed in the rather difficult position of being able to avoid legal sanctions only by exposing himself to the very likely more damning societal sanctions against bisexuality.⁶² This situ-

grounds, 474 F.2d 949 (6th Cir. 1972) (by enacting Title VII "Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes").

See also Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 704-05 (1971):

These ordinances reflect two different facets of the female stereotype in the mythology of male supremacy. On the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to immoral influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva—and either way she loses.

Accord, *Williams v. Saxbe*, 413 F. Supp. at 658: "On its face, the statute clearly does not limit discrimination to sex stereotypes." A sex stereotype, however, can be a shorthand way of describing discriminatory treatment. If a stereotype is sex based it is applied only to one sex and treatment applied only to one sex is discriminatory—thus sex stereotypes are no more than a subset of sex discrimination.

62. It is particularly in this twilight area that one suspects that perhaps Title VII is not the perfect solution to the problem of sexual harassment. Sexual harassment in any context, imposed on any individual, should not be tolerated. However, simply because the conduct is also intolerable outside the parameters of sex-based employment discrimination does not mean that Title VII should not be used to attack the circumscribed aspect of this conduct to which it is applicable. In this instance, it is only the discriminatory application that is being attacked, not the evil conduct itself. This is not a concern unique to the area of sexual harassment; it is rather a recurring philosophical problem in the area of employment discrimination. Whereas the uttering of the epithet "nigger" is offensive in any context, it is actionable under Title VII only when used in the course of employment. No matter how objectionable the treatment, if it is applied outside the employment context, or is applied uniformly to all employees within the employment context, or discriminates on some basis other than race, sex, color, religion, or national origin, it will not be found actionable under Title VII. See note 19 *supra*. Nonetheless, the fact that Title VII cannot cure all social ills is no reason to preclude it from curing those to which it is addressed.

To get at the underlying evil, one would have to take some other route. There are several tort remedies that might conceivably provide relief. If the harassment is physical the employee might sue the supervisor for battery, but this would limit her relief to whatever damages (compensatory and exemplary) she could get from the supervisor. W. PROSSER, *LAW OF TORTS* § 9, at 34-37 (4th ed. 1971). It is possible that the employer might be reached through application of the doctrine of respondeat superior, under which the servant's acts are imputed to the master. Were this possible, the remedy would be more viable because the employer's resources are generally greater than the supervisor's. In order to invoke the doctrine of respondeat superior, it is necessary that the employee have been acting with the scope of his or her employment. In order to be within the scope of agency, the conduct must have been actuated, at least in part, by a purpose to serve the master. RESTATEMENT (SECOND) OF AGENCY § 228 (1958). Prosser suggests that it is particularly difficult to find liability when the employee has committed an intentional tort for purely personal reasons, although there has been a recent trend toward recovery on the ground that the employment provided the opportunity and incentive for the act. W. PROSSER, *supra*, § 70, at 466 (citing *Bowman v. Home Life Ins. Co. of America*, 243 F.2d 331 (3d Cir. 1957) (insurance company's field underwriter represented himself to be a doctor, and made an indecent examination of an applicant for insurance)).

Recovery for emotional distress is probably not feasible since it has thus far been

ation might be somewhat distasteful, but it is presumably a solution society can tolerate. The supervisor is not being denied a defense—he can show either that there was no harassment or that he is bisexual.⁶³ It is unlikely, however, that there will be much sympathy generated for the predicament of the bisexual supervisor whose victim, only by happenstance, was female.

limited to either outrageous conduct situations or to situations in which another tort has already been inflicted. Once again, relief is limited to what can be recovered from the supervisor unless the doctrine of respondeat superior can be invoked. W. PROSSER, *supra*, § 12.

There has been some support for finding discrimination itself to be a tort, in which case there would be basis for an emotional distress claim. *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974) (where black employee appeared to have suffered psychic injury when white employee was promoted instead of him, there should be a jury trial to determine damages); Note, *Employment Discrimination Litigation: The Availability of Damages*, 44 U.M.K.C.L. REV. 497 (1976); 54 VA. L. REV. 491 (1968). This approach, however, provides only an additional remedy once discrimination is found, rather than an alternative to finding discrimination.

Another possible area of tort relief is interference with contract. W. PROSSER, *supra*, § 129, at 932–33. It has frequently been held that since a contract-at-will is a subsisting relationship until terminated, interference with such a contract is actionable. Again, this is limited to damages against the supervisor. Because this cause of action requires that the supervisor be seen as a third party, there is even less chance here that the doctrine of respondeat superior may be successfully invoked.

A particularly appealing remedy, and one that seems to be attracting an increasing number of proponents, is the simple contract remedy for breach. In a recent New Hampshire case, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), a woman employee who was terminated from her job for refusing a sexual relationship with her supervisor was reinstated with back pay when the court found that such conduct constituted a breach of contract-at-will. The court held that “a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.” 316 A.2d at 551.

With regard to the conception that the terminable-at-will employment contract may be terminated for any reason, it has been argued that “[d]iscarding this concept will cause no catastrophic legal change but will simply balance the equities of the parties in accordance with their obvious understanding . . . and will conform with today’s social and economic realities. The doctrine was judicially created and should be judicially re-evaluated and discarded.” Brief for Appellant at 33, *Roberts v. Atlantic Richfield Co.*, 88 Wn. 2d 887, 568 P.2d 764 (1977). Much support has been generated for this theory. See, e.g., *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); 7 CONN. L. REV. 758 (1975); 26 HASTINGS L.J. 1435 (1975); 63 KY. L.J. 513 (1975); 35 LA. L. REV. 710 (1975); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

63. Bisexuality would certainly not be an irrebuttable defense—although a bisexual supervisor may not have a sexual preference for women, he might still harass only women in response to the prevailing stereotype. The employee can always attempt to prove this pattern of harassment, but unless the supervisor had a history of such conduct it seems unlikely that she would prevail.

II. EMPLOYER LIABILITY FOR ACTS OF SUPERVISOR

Even if the courts were to accept the foregoing analysis, they would still be faced with the question whether the acts of the supervisor can be imputed to the employer and, if so, under what circumstances. That an employer is responsible for the behavior of its agents within the course of their employment is a well established doctrine,⁶⁴ and is explicitly set out in the statute.⁶⁵ However, the *Corne*⁶⁶ court came very close to rejecting this policy when it stated that "[a] reasonably intelligent reading of the statute demonstrates it can only mean that an unlawful employment practice must be discrimination on the part of the employer."⁶⁷

In a further attempt to vindicate the employer, the *Corne* court found that the supervisor's conduct was nothing more than a "personal urge" or "proclivity." The *Barnes* court, too, found that some significance inhered in calling such conduct "personal." The usefulness of these observations is not readily apparent, but they seem to be attempts to remove the activity from the employment context in order that it not be imputed to the employer. This defense is not absolute, however, because—regardless of the personal motivations of the supervisor—if the consequences contravene the Act, the conduct is

64. *E.g.*, *Walthall v. Blue Shield*, 12 Fair Empl. Prac. Cas. 933 (N.D. Cal. 1976) (employees failed to present adequate evidence to support their claim of racial harassment, but had there been factual allegations tending to prove the harassment, the employer could have been held liable for the harassment by lower level management people despite an exemplary record); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522 (W.D. Pa. 1973) (employer responsible for acts of supervisory personnel); *Slack v. Havens*, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975) (employer held responsible for supervisor's discriminatory firing of four black women); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971) ("Little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action"); *Anderson v. Methodist Evangelical Hosp., Inc.*, 3 Empl. Prac. Dec. 6944 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972) (notice of race discrimination to supervisory agents of a corporation constitutes notice to the corporation since it speaks through its agents); EEOC Dec. (CCH) ¶ 6347 (1972) (an employer is responsible for the actions of its supervisors); EEOC Dec. (CCH) ¶ 6193 (1970) (unlawful for supervisor to discharge white employee for associating with black employees and his actions will be imputed to his employer); EEOC Dec. (CCH) ¶ 6085 (1969) (knowledge of supervisor is deemed knowledge of employer).

65. 42 U.S.C. § 2000e(b) (1970) includes the agent of an employer within the meaning of the term "employer." See *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976); *Slack v. Havens*, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975).

66. 390 F. Supp. 161 (D. Ariz. 1975).

67. *Id.* at 163. In a footnote, the *Tomkins* court took issue with the apparent rejection of the doctrine of respondeat superior by the *Corne* court. 422 F. Supp. at 556.

thereby proscribed.⁶⁸ The terms "personal" and "non-employment related" are not interchangeable. As the *Williams* court pointed out, a factual determination is necessary to find whether the supervisor's conduct is symptomatic of an employment policy or is instead a non-employment related personal encounter.⁶⁹ The question can only be answered on a case-by-case basis, although some general guidelines can be drawn. It is obvious that when a supervisor's personal urges affect the hiring, firing, or working conditions of an employee, his conduct ceases to be totally private. In order to give any effect to the Act, courts must and do hold that when a protected individual is fired because of the personal prejudices and biases of his or her supervisor the Act applies.⁷⁰ The EEOC has found that conduct as seemingly personal as discussing religion,⁷¹ telling Polish jokes,⁷² or using the term "nigger"⁷³ could be employment related and thus proscribed by the Act if an atmosphere of intimidation were thereby created. Surely, having sexual consideration made a job requirement or being subjected to physical and verbal sexual advances could create an equally intimidating atmosphere.

68. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975) (court looks to the consequences of the employment practices rather than to the intent to discriminate); *Sims v. Sheet Metal Workers Local 65*, 353 F. Supp. 22, 25 (N.D. Ohio 1972) ("the thrust of the Act is to the consequences of employment practices, not simply the motivation").

69. 413 F. Supp. at 660. *Accord*, *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 605 (S.D. Ohio 1975) ("Whether or not the defendant has engaged in acts of discrimination is essentially a question of fact to be resolved on a case by case basis"); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 430 (D. Utah 1971) ("In a case such as this, the trier of fact determines the reasons for an employee's discharge based on 'reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole'"); *Anderson v. Methodist Evangelical Hosp., Inc.*, 3 Empl. Prac. Dec. 6944, 6947 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972) (trial court concluded that the "[q]uestion of whether employer was guilty of discriminatory practice is basically one of fact for determination on a case by case basis").

70. *See, e.g.*, *Slack v. Havens*, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975) (employer responsible for supervisor's firing of four black women for failing to "stay in their place"); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522 (W.D. Pa. 1973) (employer is responsible for supervisor's carrying out feelings of hostility toward women).

71. *E.g.*, EEOC Dec. (CCH) ¶ 6347 (1972) (interference with job performance caused by supervisor's discussing his religious convictions with employees found to be discrimination on the basis of religion under Title VII).

72. EEOC Dec. (CCH) ¶ 6085 (1969) (tolerating the telling of Polish jokes and making of derogatory remarks about employee's ancestry by fellow employees is found actionable under Title VII).

73. *E.g.*, EEOC Dec. (CCH) ¶ 6193 (1970) (unlawful for supervisor to call black employee "nigger," and his actions will be imputed to the employer).

While not rejecting the view that an employer can be liable for tacitly approved acts of its supervisors, the *Miller* court suggested that when an employer adopts a mechanism for preventing sexual discrimination, tacit approval cannot be found, thus placing the supervisor in the same position as any other employee. This assertion flies in the face of a strong judicial policy of recognizing employer responsibility for a supervisor's actions,⁷⁴ even when the employer has been found to have "an outstanding record in regard to fair and impartial treatment of the races."⁷⁵ In light of the many EEOC decisions requiring an atmosphere free from intimidation, even by fellow employees,⁷⁶ hiding behind the label of "employee" is unlikely to exculpate the offending supervisor.⁷⁷

The *Corne* court stated finally that, for conduct to qualify as a policy of employment, the employer must have benefited from it in

74. See note 64, *supra*.

75. *Anderson v. Methodist Evangelical Hosp., Inc.*, 3 Empl. Prac. Dec. 6944, 6946 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

76. *E.g.*, *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971); EEOC Dec. (CCH) ¶ 6387 (1973) (employer found responsible for racial harassment of Spanish surnamed employee which culminated in employee quitting); EEOC Dec. (CCH) ¶ 6354 (1972) (where employer was aware of harassment of black and Spanish surnamed employees by both supervisory and nonsupervisory personnel and did not take reasonable steps to eliminate it, discrimination was found); EEOC Dec. (CCH) ¶ 6311 (1971) (employer's failure to remedy harassment of Mexican-American by employees when employer became aware of the situation and the subsequent discharge of the employee for not getting along with fellow workers found to be national origin discrimination); EEOC Dec. (CCH) ¶ 6290, at 4512 (1971) ("Title VII requires an employer to maintain a working environment free of sex-based intimidation"). See note 40 *supra* for weight accorded EEOC decisions.

77. The *Miller* court found that the existence of a policy of discouraging sexual harassment, and a policy of disciplining the employees found guilty of such conduct, was evidence that the employee's conduct could not be imputed to the employer bank. It is true that if the bank had a history of affirmatively disciplining those guilty, and of actively investigating claims of discrimination rather than simply a policy of doing so, then it might be proper that it be found not liable. The mere existence of such a policy and nothing more, however, cannot exonerate the employer. See, *e.g.*, EEOC Dec. (CCH) ¶ 6321 (1971).

Most of the cases prohibiting a discriminatory atmosphere require, in addition, "positive action where positive action is necessary to eliminate employee intimidation." EEOC Dec. (CCH) ¶ 6030, at 4056 (1969). *Accord*, EEOC Dec. (CCH) ¶ 6290 (1971). It is not enough that an employer establish a policy deploring discriminatory harassment: "The mere announcement of a policy against racial discrimination is not sufficient when management has reason to believe that racial discrimination is occurring. Management must take steps to insure that the policy is observed at all levels." EEOC Dec. (CCH) ¶ 6013, at 4033 (1969).

In the case of a supervisor's misconduct, because an employer is responsible for the actions of its supervisors, it is questionable whether there can be exoneration even in the face of a vigorously exercised policy. A policy not uniformly exercised should certainly not serve to exculpate an employer. See, *e.g.*, EEOC Dec. (CCH) ¶ 6347 (1972) (supervisor preaches only to selected employees).

some way. This observation cannot withstand even the most cursory analysis; by requiring that an employer benefit from discrimination before it be found actionable, it would seem to suggest that actionable discrimination is a profitable and therefore rational practice.⁷⁸ Most employment discrimination seems to occur not as the result of a reasoned decision to adopt a beneficial, albeit discriminatory policy, but rather as a response to a personal bias or stereotype.⁷⁹

III. THE COURTS' CONCERN WITH NONSUBSTANTIVE "HOUSEKEEPING" ISSUES

The courts perceive sexual attraction as one of those areas they are better off avoiding—the attraction of males to females is seen as a natural part of life with which the courts feel they should not interfere.⁸⁰ The courts fear that if they disregard this caveat they will find

78. The suggestion that by discriminating against women, blacks, and other protected categories the employer benefits is itself discriminatory. The inference is that by maintaining the present system of white male dominance the business will function at its optimum level.

79. See, e.g., PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMM. ON PRIVATE EMPLOYMENT I (1963).

"When sex discrimination compels women to take jobs requiring less than their capacities, or to remain out of the work force altogether, society suffers the loss of needed talent." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1168 n.16 (1971).

80. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 555 (D.N.J. 1976); *Miller v. Bank of America*, 418 F. Supp. 233, 235 (N.D. Cal. 1976). It is this type of attitude that has contributed to the unconscionable reluctance to charge, convict, and sentence in rape cases. One member of a jury which had convicted a woman of second degree murder for killing her rapist revealed in an interview that he believed no woman should be acquitted on the ground of self-defense if she killed a man during the rape. He stated: "[T]he guy's not trying to kill her. He's just trying to give her a good time. To get off, the guy will have to do her bodily harm, and giving a girl a screw isn't doing her bodily harm." Ms., May, 1975, at 86.

In an analysis of Seattle rape complaints the police identified 85 suspects in connection with 308 complaints. Of these, 57 were charged, but only 31 were charged with rape or attempted rape. In subsequent trials, 17 defendants either pled guilty or were found guilty, but 11 of those were found guilty of offenses other than rape. Only six suspects were convicted of rape or attempted rape. Battelle Human Affairs Research Centers, Discretionary Grant No. 75-NI-99-0015, Law Enforcement Assistance Administration, Research and Development of Model Procedures for Criminal Justice System Involvement with the Crime of Forcible Rape, Final Report (Nov. 10, 1975) (unpublished report on file at Battelle Institute, Seattle, Washington). Forcible rape has a lower conviction rate than any other crime listed in the Federal Bureau of Investigation's *Uniform Crime Reports*, and in California, no other felony has an acquittal rate as high as rape. Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 927 & n.42. In addition, an FBI report compared rape with some of the other major crimes against the person, and, of these crimes, forcible rape was the least likely to be cleared by arrest. At 51%, rape ranked fourth behind negligent manslaughter (79%), murder (78%), and aggravated assault (64%).

themselves facing a line-drawing problem of significant proportions.⁸¹ Linedrawing, however, is a problem inherent in the law,⁸² and it is one the courts must face. It is the job of the fact finder to determine what degree of harassment is necessary to state a claim.⁸³ Fear of "opening the floodgates" is common in any newly emerging area of the law;⁸⁴ there will naturally be an additional burden placed on the courts with recognition of any new cause of action. In this area, however, courts are accorded ample protection. The EEOC will serve as a preliminary screening body, discouraging claimants with unsubstantiated charges from pursuing any action, and conciliating claimants whose complaints appear valid. Moreover, many potential litigants will be discouraged because the burden of financial risk in Title VII cases can be prohibitive, and it is most uncommon for the court to appoint Title VII counsel.⁸⁵ In addition, once sexual harassment is recognized as actionable and the first cases are decided, guidelines will have been established with precedential value. Finally, litigation in the area will serve the further purpose of encouraging employers to establish internal means of dealing with such occurrences and might, in fact, foster more circumspect conduct on the part of supervisors.

Clearly, there is no basis for suggesting that women are more likely than any other protected group to flood the courts with unfounded self-serving claims of harassment. Although the Anglo-American legal yardstick is the "reasonable man," this does not preclude the possibility that women, too, are reasonable beings.

FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 40 (1976).

Nonetheless, rape is proscribed in spite of the fact that intercourse is a natural sex phenomenon. Even bigotry might be termed "natural"—a great many prohibited activities are "natural" but they do not fit within a civilized picture of society. In any event, Title VII prohibits such behavior—whether or not the individual judges want to interfere, the statute mandates that they do so.

81. The *Miller* court posed the question: "[W]ho is to say what degree of sexual cooperation would found a Title VII claim?" 418 F. Supp. at 236.

82. E.g., Oberer, *The Scierter Factor in Sections 8(a) (1) and (3) of the Labor Act: of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 502 (1967).

83. See note 68 *supra*.

84. See W. PROSSER, *supra* note 62, § 12, at 51 (4th ed. 1971) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds").

85. Dunlap, *A View of Sex Discrimination Cases under Title VII: Making it Work*, in WOMEN AND THE LAW, SYMPOSIUM ON SEX DISCRIMINATION 84, 91 (1976).

IV. CONCLUSION

As long as employers and supervisors are allowed to view women solely in terms of their gender instead of judging them on the basis of their individual qualifications, Title VII will have failed to fulfill its promise of equality in the area of employment. Permitting sexual harassment imposes conditions on women that are not impressed on similarly situated males. In other areas of sex discrimination, that is enough to trigger the application of the Act, and should do so here as well.

There is, of course, some hesitation on the part of the courts to accept what appears to be a new reading of the law. What the courts view here as a radical departure from traditional Title VII analysis, however, flows naturally from the reasoning of preceding cases. The *Williams* court properly recognized the problem as a factual one, involving the questions of whether the harassment is employment related, and whether it serves to place female employees at a disadvantage vis-a-vis male employees. If the answer to both of these questions is yes, clearly the courts are compelled to find the practice to be sex discrimination under Title VII of the Civil Rights Act of 1964.

V. ADDENDUM

Since this comment was completed, two courts of appeals have held that sexual harassment is actionable under Title VII. In *Barnes v. Costle*,⁸⁶ the Court of Appeals for the District of Columbia rejected the lower court's conclusion in *Barnes v. Train* that the employee was harassed not because she was a woman but because she refused a sexual relationship. The court found that it was only because she was a woman in a subordinate position that she was expected to engage in a sexual affair. Her gender was considered by the court to be an indispensable factor in her harassment, because a similar condition was not imposed on a male employee, and sexual harassment was held to be actionable under Title VII even if there is but one victim. Additionally, the court of appeals disagreed with the lower court's conclusion that the encounter resulted from an "inharmonious relationship" and therefore fell outside the purview of Title VII. The court of appeals held that the employer was chargeable with the Title VII violations of

86. 46 U.S.L.W. 2051 (D.C. Cir. July 27, 1977).

its supervisor. The Court of Appeals for the Fourth Circuit, in a one-paragraph opinion, also held that compelling female employees to submit to sexual advances of their male supervisors is in violation of Title VII.⁸⁷

Kerri Weisel

87. *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977).